IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 1109 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE D.H.WAGHELA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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CHANDRAKANT SHANTILAL SHAH - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :

MR ATUL H MEHTA for Applicant(s) : 1,
MR.SS PATEL APP for Respondent(s) : 1,
MR MJ BUDDHBHATTI for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 05/03/2007

ORAL JUDGMENT

1. By this petition, exclusively under Article 227 of the Constitution, petitioner, the original complainant in Criminal Case No.439 of 1995 pending in the Court of learned J.M.F.C., Godhra,

has challenged the order dated 10.02.1998 of learned Additional Sessions Judge in Criminal Revision Application No.4 of 1998 by which the order dated 01.10.1996 of learned J.M.F.C. below application Exh.565 was quashed. The said order below application Exh.565 was to the effect that the person named as one of the witnesses in the chargesheet, namely Shri Manubhai N. Naik, who is respondent No.2 herein, was arrayed as an accused under the provisions of Section 319 of the Code of Criminal Procedure (for short the 'Code'). The grounds on which respondent No.2 was summoned as an accused person by the trial court were that he was named in F.I.R. as an accused person but dropped in the chargesheet without filing by the investigation officer of a report under Section 169 of the Code and, at the time of hearing of the application Exh.565, his advocate had not remained present.

2. That order dated 01.10.1996 of learned J.M.F.C., Godhra was challenged by way of filing

Criminal Revision Application by the newly joined accused person, respondent No.2 herein, and after finding the case to be an exceptional one, extensively referring to the material on record, the learned Additional Sessions Judge found it to be illegal and improper to convert the important witness into an accused person at the stage of trial where it was. Therefore, by the impugned order, the aforesaid order of learned J.M.F.C. was set aside on 10.02.1998.

3. With the above backdrop of relevant facts, learned counsel for the petitioner mainly argued that learned Sessions Judge had no authority and jurisdiction, under the provisions of Section 397 of the Code, to re-appreciate the evidence and material on record to arrive at a finding different from the one arrived at by the trial court. He, however, fairly conceded that the order below application Exh.565 of the trial court did not refer to any evidence or material in detail and what material weighed with the

Court was not clear from the order dated 01.10.1996. He also conceded that the material which was available before the trial court and which was supposed to have been called and perused by the Sessions Court was not produced before this Court. He however, relied upon the judgment of the Supreme Court in **Pathumma and another V/s. Muhammad [(1986)2 SCC 585]** wherein it was observed that the High Court, in its revisional jurisdiction, was not justified in substituting its own views for those of the learned Magistrate on a question of fact. Learned counsel also relied upon the judgment of the Supreme Court in **Duli Chand V/s. Delhi Administration [AIR 1975 SC 1960]** wherein the Magistrate and the Additional Sessions Judge had arrived, on assessment of the evidence, at a concurrent finding of fact, the High Court even though justified in refusing to re-appreciate the evidence, reviewed the same in order to satisfy itself and the Supreme Court refused to interfere in an appeal under Article 136 of the

Constitution. While refusing to re-appreciate the evidence for the purpose of examining whether the finding of fact concurrently arrived at by the High Court and the subordinate Courts was correct, the Supreme Court observed that it is only in rare and exceptional cases where there is some manifest illegality or grave and serious miscarriage of justice that that Court would interfere with such finding of fact.

4. Learned counsel Mr.M.J. Buddhbhatti, appearing for respondent No.2, submitted that the impugned order was expressly made in the exceptional circumstances of an important witness being converted into an accused person and after being conscious of the limitations of the Court while exercising revisional jurisdiction. He submitted that the impugned order was based upon perusal and consideration of the material on record which record was not made available to this Court. He, therefore, submitted that the jurisdiction of this Court under Article 227 of

the Constitution would be even more restricted while proposing to interfere with the impugned order. Learned counsel Mr.Buddhbhatti relied upon the recent judgment of the Supreme Court in **Kishori Singh and others V/s. State of Bihar and another [(2006)1 SCC (Cri) 275]** wherein it was held that the Magistrate was not justified in issuing process against the persons who were named in the F.I.R. as accused person but not chargesheeted in the chargesheet. It is clarified that such persons can be arrayed as “accused persons” in exercise of powers under Section 319 of the Code of Criminal Procedure when some evidence or materials are brought on record in course of trial or reference made either by the Magistrate while passing an order of commitment or by the higher Court on examining the materials to suggest that sufficient ground existed for proceeding against them even though the police might not have filed chargesheet. He also relied upon the judgment of the Supreme Court in **Prasanna Das and another V/s. State of Orissa**

[(2006)1 SCC (Cri) 278 and the observations made by the Division Bench of this Court in **Pruthvirajsing @ Aniruddhsinh V/s. R.K. Singhla and another [2000 (2) G.L.H. 488].**

5. The impugned order made in exercise of the revisional jurisdiction under Section 397 of the Code is found to be based upon reasonable consideration of the material before the Court and expressly made to operate at the stage where the trial was. Provisions of Section 397 of the Code expressly permit the Court to call for and examine the record of any proceeding before any inferior Criminal Court for the purpose of satisfying the higher Court about not only correctness and legality but the propriety of any finding or order. However, the revisional jurisdiction could be exercised only in rare cases where the error in judgment has resulted into failure of justice as mentioned in the provisions of Section 465 of the Code. In view of the express provisions of Section 397, it cannot

be said that learned Sessions Judge had no jurisdiction to make the impugned order in exercise of his revisional jurisdiction; and to assail it as perverse or illegal, no material is placed on record. Therefore, it would be impermissible to interfere with the impugned order in exercise of the supervisory jurisdiction of this Court under Article 227 of the Constitution. It is indeed unfortunate that the present petition has remained pending in this Court for about eight years, with the consequences about which also, learned counsel on either side are not clear.

6. In the result, the petition is dismissed and Rule is discharged with no order as to costs. Trial be expedited.

(D.H.WAGHELA, J.)

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